No. 01-1869

Supreme Court U.S.
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IN THE

Supreme Court of the United States

BUCKINGHAM TOWNSHIP,

Petitioner,

v.

KEN WYKLE, Administrator, Federal Highway Administration; DAVID LAWTON, Chief of Planning, Region 3 Federal Highway Administration; Delaware Valley Regional Planning Commission; and BRADLEY MALLORY, Secretary for the Department of Transportation, Commonwealth of Pennsylvania,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the circuit courts are consistently applying this Court's decisions regarding the public disclosure required under the National Environmental Policy Act.

2. Whether the circuit courts are consistently applying this Court's decisions regarding the court's consideration of extra record evidence.

3. Whether petitioner waived the Eleventh Amendment issue by failing to challenge the dismissal of the state law claims in the Third Circuit.

4. Whether the Eleventh Amendment immunity applies to the state law claims raised by petitioner in its amended complaint after the stated filed its motion to intervene.

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STATEMENT OF THE CASE

Petitioner, Buckingham Township, challenges the Federal Highway Administration's (FHWA) approval of the "New Alignment Alternative" to relieve traffic congestion and improve capacity and safety on U.S. 202 in Southeastern Pennsylvania. Within Pennsylvania, U.S. 202 forms a 95 kilometer (59 mile) corridor around the Philadelphia

metropolitan area between the Delaware and New Jersey state lines. (C.A. App. 2-000019a.) [1]

To comply with the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. § 4321, *et. seq.* (NEPA), respondents [2] prepared a Draft Environmental Impact Statement (DEIS) (C.A. App. 2-002850-3494), a Final Environmental Impact Statement Evaluation (FEIS) (C.A. App. 2-000001-2843), and numerous other technical studies involving the project. The DEIS and FEIS were circulated to obtain public and agency comments. (C.A. App. 2-000554-566; 3-001725-1743; 3-001752-1770.)

Respondents studied a total of twelve project alternatives. Of the twelve alternatives, the No Action Alternative; the Widening Alternative; the New Alignment Alternative; and the Combination Alternative were studied in detail in the environmental impact statement. (C.A. App. 2-000268.) The remaining eight alternatives were dismissed from further consideration because they did not satisfy the project needs or had excessive environmental impacts.

Respondents published a notice of the availability of the DEIS and FEIS for review and comment by the public in the *Federal Register*, *The Philadelphia Inquirer*, *Intelligencer Record* [3], *The Montgomery County Observer*, *The Reporter*, and *The Time Herald*. The DEIS and FEIS were available for public review and inspection at several locations throughout the study area during regular business hours. In addition,

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[1] Citations are to the Appendix in the Court of Appeals (C.A. App.), to the Appendix to the Petition (Pet. App.), and to the Petition (Pet.).

[2] Respondents are Ken Wykle, Administrator of FHWA, David Lawton, Chief of Planning, Region 3 of FHWA, Delaware Valley Regional Planning Commission, and Bradley Mallory, Secretary for the Pennsylvania Department of Transportation.

[3] Both the *Intelligencer Record* and *Philadelphia Inquirer* have wide circulation in Buckingham Township. (C.A. App. 2-000968a.)

respondents held a public hearing to provide an opportunity for local officials and the general public to state their concerns and opinions regarding the DEIS. (C.A. App. 2-003499a, 2-000558a-559a.) Approximately 113 people provided testimony at the public hearing, and over 6,000 comments were received on the DEIS alone. Respondents considered and responded to each of the substantive comments received on the DEIS and FEIS. Moreover, respondents considered all substantive comments received up to the issuance of the Record of Decision (ROD). (C.A. App. 2-003510a.)

Respondents even conducted additional studies to address some of the comments received on the DEIS. Specifically, at the request of FHWA and PennDOT, Delaware Valley Regional Planning Commission (DVRPC)[4] prepared Supplement 4 to the Section 700 Traffic Analysis to respond to comments made by petitioner on traffic and population issues.[5] (C.A. App. 2-003812-3935.) The results of Supplement 4 were summarized in the FEIS. (C.A. App. 2-000512a-534a.)

Representatives for petitioner actively participated in the public involvement process for the project. Petitioner attended and provided oral testimony at the public hearing held on September 12, 1996, for the DEIS. (C.A. App. 2-001124-1129.) Moreover, respondents met with petitioner on September 19, 1996, to discuss its concerns with the project. (C.A. App. 2-000561.) Petitioner also submitted thirty-four

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[4] The DVRPC is the designated metropolitan planning organization (MPO) for Southeastern Pennsylvania pursuant to 23 U.S.C § 134.

[5] Petitioner erroneously claims that Supplement 4 was not provided to them until after the FEIS was circulated. (Pet. 5.) Respondents made available to petitioner a copy of draft Supplement 4 on August 20, 1997, and final on October 10, 1997. (C.A. App. 3-001872-73; 3-001884.) The FEIS was not approved for circulation until October 16, 1997. (C.A. App. 2-000002a.)

pages of written comments on the DEIS (with seventy-eight pages of attachments) which were dated October 11, 1996. (C.A. App. 2-000911a.) On January 9, 1997, respondents met with Bucks County and several townships (including petitioner) to present the results of the additional traffic studies. (C.A. App. 3-000722.) On January 30, 1998, petitioner submitted comments on the FEIS and Supplement 4. (C.A. App. 3-000722.) Petitioner's comments consisted of a four volume set of documents - Volume IV of which is the Tomazinas Study which commented on the results of Supplement 4. Respondents considered and responded to the comments provided by petitioner at the public hearing and its written comments on the DEIS, FEIS, and Supplement 4. (C.A. App. 2-001126-1129; 2-000968-991; 3-000663-690.)

Petitioner also requested and was afforded a meeting with FHWA officials on February 27, 1998, at its Washington D.C. Headquarters; at which it presented its objections to the project, and resubmitted its comments. (C.A. App. 3-001922-1923.) FHWA officials in Washington D.C. reviewed the comments from petitioner and the FEIS and concluded that the FEIS addressed petitioner's concerns. (C.A. App. 4-135-137.)

FHWA weighed the resulting benefits and impacts from the alternatives studied in detail and selected the New Alignment Alternative. On August 27, 1998, FHWA signed the ROD. (C.A. App. 2-003496-3533.) The ROD completed the NEPA process.

Petitioner filed a complaint in the United States District Court for the Eastern District of Pennsylvania (district court) against FHWA alleging violations of the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, NEPA, the National Historic Preservation Act, 16 U.S.C. §§ 470f&470-2(f), the Clean Air Act, 42 U.S.C. § 7506; and the Federal Aid Highway Act, 23 U.S.C. §§ 109(a)(2)&(h), 134, 135. Secretary Mallory filed a motion to intervene which was

granted by the district court. In response, petitioner requested leave to amend its complaint to include several state law claims against Secretary Mallory. Secretary Mallory moved for partial judgment on the pleadings requesting the dismissal of the state law claims based on Eleventh Amendment immunity. The district court granted Secretary Mallory's motion and dismissed the state law claims on February 25, 2000.

All parties moved for summary judgment on all of the federal claims. On June 22, 2001, upon consideration of numerous briefs that were filed with the court, the twenty-two box administrative record, and oral argument, the district court entered a memorandum and order granting respondents' motion for summary judgment and denying petitioner's motion. The district court specifically found that respondents had not acted in bad faith; that the traffic analysis and the alternative analysis contained in the DEIS and FEIS was adequate; and additional extra-record evidence was not appropriate. (Pet. App. 18a-19a, n. 10; 26a-27a, n. 15; 30a, n. 16; 35a.)

Petitioner appealed the June 22, 2001, judgment to the United States Court of Appeals for the Third Circuit. The Third Circuit affirmed stating: "The District Court wrote an excellent opinion that thoroughly addressed each of the numerous issues raised by Buckingham Township in its lengthy brief. We have nothing to add to that Court's fine opinion, and thus affirm." (Pet. App. 2a.)

REASONS FOR DENYING THE WRIT

This Court should deny the writ because the Court of Appeals' decision affirming the district court is unremarkable, and clearly correct. There is no issue of import sufficient to warrant review by this Court, nor is there a split in the circuit courts, only the petitioner's disagreement with the lower courts' interpretation of the record.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE PUBLIC DISCLOSURE REQUIRED UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT.

Petitioner claims that the Third Circuit allowed the FHWA to evade compliance with NEPA by failing to place into the record information which it possessed or had in its control. [6] (Pet. 11.) Specifically, petitioner claims that the DEIS and FEIS failed to fully disclose the environmental consequences of the project because (1) the traffic analysis was based on model outputs that were adjusted by the experts running the model and on the existence of alleged fictional lanes within the model; and (2) the impacts of the Pools Corner intersection project were not included in the FEIS for the Section 700 project. [7] (Pet. 12-13.) Petitioner also claims that the DEIS and FEIS failed to contain a complete

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[6] Petitioner mischaracterizes the Third Circuit's decision in *Township of Springfield v. Lewis*, 702 F.2d 426, 442 (3d Cir. 1983). (Pet. 11.) Petitioner claims that the Third Circuit permitted an agency to rectify the failure to properly address an alternative with an extra record affidavit submitted by the agency, which violated NEPA's disclosure requirements. However, the Third Circuit based its review of the alternatives on the FEIS and extra record expert affidavits presented by appellants, not the agency. *Id.* at 442.

[7] The traffic impacts at Pools Corner (the intersection of Routes 313, East State Street, and existing US 202) were disclosed in the FEIS for the Section 700 project. (C.A. App. 2-000526a.) No significant environmental impacts were found. (C.A. App. 2-003668 to 2-2003811.) Petitioner's attorney sent comments on the Pools Corner project and a presentation was made to petitioner's Supervisors. (C.A. App. 3-001982-1984, 3-003727.) Following a review of the environmental studies for Pools Corner and the comments received, FHWA determined that the Pools Corner project qualified as a Categorical Exclusion pursuant to FHWA regulations, 23 C.F.R. § 771.117(d). The improvements contemplated by the Pools Corner Project were needed regardless of whether or not the Section 700 project is ever built. Therefore, the Pools Corner project is an independent project with independent utility. (C.A. App. 2-00527a-528a.)

discussion of alternatives because the "controlled arterial alternative" was excluded from the alternative analysis. (Pet. 12-13.) The district court adequately addressed these factual issues and it is clear that decision here is consistent with well-settled law.[8]

NEPA has two fundamental purposes. First, NEPA "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1973), *see also*, *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983). Second, NEPA ensures that the public will be informed of the potential environmental impacts considered by the agency in its decision-making process. *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 143 (1981); *Baltimore* 462 U.S. at 97. Under NEPA, agencies are not required to elevate environmental concerns over other considerations. *Baltimore Gas*, 462 U.S. at 97; *Stryckers' Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980)(*per curiam*). NEPA only requires that the agency take a "hard look" at the environmental impacts of the project during its decision-making process. *Baltimore Gas*, 462 U.S. at 97; *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976). In reviewing an agency decision under NEPA, "[t]he role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Baltimore Gas*,

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[8] Petitioner contends that the district court found this project to be "good", "necessary", and "reasonable" and then excused compliance with NEPA. To the contrary, the district court carefully analyzed the record and voluminous briefs filed with respect to this project and found that the procedural process mandated by NEPA was fully followed. (Pet. App. 24a-31a.)

462 U.S. at 97-98, *citing Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-417 (1971).

This Court has addressed the issue of disclosure required by NEPA in *Baltimore Gas*, 462 U.S. at 98-101. In *Baltimore Gas*, the Court reviewed the Nuclear Regulatory Commission's Statement of Consideration announcing the final Table S-3 which evaluated the environmental effects of the nuclear fuel cycle for nuclear power plants. *Id.* at 99. The issue was whether the Commission properly disclosed the uncertainties considered by the Commission regarding the nuclear fuel cycle in accordance with NEPA. The Statement summarized "the major uncertainty of long-term storage in bedded-salt repositories, which is that water could infiltrate the repository as a result of such diverse factors as geologic faulting, a meteor strike, or accidental or deliberate intrusion by man." *Id.* Table S-3 also referenced studies that discussed the uncertainties in greater detail. *Id.* Citing Council on Environmental Quality regulations, 40 C.F.R. §1502.21, this Court found it proper to incorporate other studies by reference. *Id.* at 99, n. 12. Based on the record and the Commission's statement, this Court found that the Commission adequately disclosed the uncertainties considered. *Id.* at 99.

The present case in analogous to *Baltimore Gas*. The traffic impacts [9] and the controlled arterial alternative [10] were properly disclosed in the DEIS and the FEIS for the Section 700 project. DVRPC prepared an initial traffic study and four supplemental traffic studies for respondents. The initial traffic study evaluated six alternatives including the "controlled arterial alternative". (C.A. App. 3-000091-229.)

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[9] The district court addressed this issue in its June 22, 2001 decision and the Third Circuit affirmed. (Pet. App. 26a, n. 15.)

[10] The district court addressed this issue in its June 22, 2001 decision and the Third Circuit affirmed. (Pet. App. 30a, n. 16.)

Supplement 1 added the widening alternative and included traffic projections for additional roads, including U.S. 202 in Buckingham Township. (C.A. App. 3-000230-270.) Supplement 2 also included the traffic projections in Buckingham Township. (C.A. App. 3-000271-284.) Supplement 3 included an additional alternative (limited access, also referred to as the new alignment or expressway) and traffic projections in Buckingham Township. (C.A. App. 3-000330-373.) The traffic analysis revealed that the expressway, as contrasted with the "controlled arterial alternative", offered more relief to the local roadways, the purpose of Section 700, and more effectively satisfied the needs. (C.A. App. 3-000430.) Finally, at the request of respondents, DVRPC prepared Supplement 4 (C.A. App. 2-003812-3935) to respond to comments made by petitioner on traffic and population issues. (C.A. App. 2-000522.) Supplement 4 also detailed traffic projections in Buckingham Township.

The DEIS summarized and referenced the initial traffic study and Supplements 1 through 3. (C.A. App. 2-002865a.) The FEIS summarized and referenced the results of Supplement 4, as well as the previous traffic studies. (C.A. App. 2-000017a; 2-000533-530.) Both the DEIS and the FEIS contain two sections summarizing the traffic analysis which discussed the existing traffic, traffic projections for the year 2018, and the traffic projections associated with each of the alternatives. (C.A. App. 2-003008a-3015a; 2-003267a-3278a; 2-000177a-184a; 2-00512a-534a.) It is clear, therefore, that by any reasonable measure the traffic analysis was adequately disclosed under NEPA.

Petitioner suggests that there is a conflict among the circuits regarding NEPA's disclosure requirements. Petitioner seems to suggest that other courts of appeals required the disclosure of *all* facts and analyses. (Pet. 10.)

But to the contrary, even the cases relied upon by petitioner undercut its position.

Per Council on Environmental Quality regulations, an environmental impact statement (EIS) is a summary document.

> Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency made the necessary environmental analyses.

40 C.F.R. §1502.1. The content of an EIS is governed by the "rule of reason". *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989). Petitioner cites a number of circuit court decisions in support of his notion that NEPA requires the explication of all facts. (Pet. 10.) However, these cases apply the "rule of reason" and have found that not all facts need to be disclosed in the EIS. *City of Bridgeton v. Federal Aviation Admin.*, 212 F.3d 448, 459 (8th Cir. 2000)(held NEPA was complied with because ROD briefly explained why several alternatives were eliminated from detailed study); *City of Carmel-By-The-Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1151, 1162-63 (9th Cir. 1997)(held that FEIS adequately disclosed (1) wetland impacts even though effected wetlands may have been expanded by earthquake; and (2) growth inducing impacts from a new highway because the development was planned for in the Carmel Valley Master Plan which was accounted for and analyzed in the FEIS); *Hickory Neighborhood Defense League v. Skinner*, 893 F.2d 58, 62-63 (4th Cir. 1990) (held supplemental EIS was not required when the Claremont Historic District was listed on the National Register of Historic Places); *Natural Resource Defense Counsel v. Hodel*, 865 F.2d 288, 297 (D.C. Cir. 1988)(held that the agencies' coverage of conservation policies served NEPA's informational purposes even though the FEIS dealt with the

matter in general terms and did not provide appellants with detailed responses to their comments); *Druid Hills Civic Assoc. v. Federal Highway Admin.*, 772 F.2d 700, 710-12 (11th Cir. 1985)(considered appellants claims that various facts were not disclosed regarding safety data and level of service for three intersections and held discussion in EIS was adequate).

It is well settled that "an agency must have the discretion to rely on the reasonable opinions of its own qualified experts . . . ." *Marsh*, 490 U.S. at 377-78. In reviewing an EIS, the district court should give latitude to the agency to rely on its own experts. *Id.*; *Baltimore Gas*, 462 U.S. at 103. Based on these rulings, the FHWA is entitled to rely on its experts; therefore, the assumptions and computer set-ups, which were subordinate to the conclusions or opinions of those experts, do not have to be in the administrative record. Furthermore, FHWA in this case carefully reviewed the traffic information as to its reasonableness and even double-checked DVRPC's results by having another consultant conduct additional traffic studies using CORSIM and the Highway Capacity Manual. (C.A. App. 3-000720-725.)

Petitioner protests, nevertheless, that several items were not discussed in the EIS, and therefore, were not properly disclosed under NEPA. (Pet. 12-13.) These items include: impacts to Buckingham Township; the "controlled arterial alternative"; adjustments made by the traffic experts to the traffic model output; and fictional lanes used in the traffic model. The issues that petitioner has with this project boil down to the adequacy of the traffic analyses. Upon reviewing the administrative record and numerous affidavits filed by both sides on traffic issues, the district court addressed each of these factual issues. The district court found that respondents conducted a series of standard traffic analyses of the area which included Buckingham Township. (Pet. App. 26a.) The district court found that respondents conducted

additional traffic studies independent of DVRPC using an alternative computer analysis which verified that Section 700 would not cause intolerable congestion north of the project area. (Pet. App. 27a.) The district court found that respondents properly analyzed the traffic by using "standard accepted methods with persons of substantial expertise who have provided sound explanations of what was done and why." (Pet. App. 27a.) The district court addressed the adjustments to the traffic numbers made by respondent's experts, finding that adjustments to the model is standard practice when conducting traffic projections.[11] (Pet. App. 27a, n. 15.) Finally, the district court addressed petitioner's erroneous fictional lane allegations, concluding that petitioner has misconstrued various planning documents and the coding convention used in those documents.[12] (Pet. App. 26a, n. 15.)

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[11] Following the computer simulation for Supplement 4, DVRPC staff reviewed the output from the computer based on: comparison with actual traffic counts; current traffic counts; traffic growth trends implicit from comparisons between the original (1991); current traffic counts; traffic flow theory; and available detailed traffic studies. Where necessary, appropriate corrections were made. Simulated traffic volumes were adjusted and corrected in accordance with accepted transportation practice to produce as accurate and representative forecasts as possible. (C.A. App. 003691-3693.) DVRPC explained the traffic volume adjustments made by DVRPC for the 29 links. (C.A. App. 003693-3701.) Most of the adjustments increased, rather than decreased, the traffic volumes over the volumes from the TRANPLAN computer output. (C.A. App. 004843-4844.)

[12] Several coding conventions can be used for the computer traffic model. The lane coding method DVRPC used for the Section 700 traffic forecasts was to code the number of intersection approach lanes (C.A. App. 004856, 004864, 004871, 004878, 005638, 005684, 005792, 005789-5793, 3-000999), and not the number of through lanes in the middle of the link, for signalized suburban and rural arterials in some sections of the U.S. 202 corridor. By using this method of lane coding, if an intersection has a turning lane, an additional lane will show up mid-block that does not exist, i.e., petitioner's alleged fictional lanes. In addition, Bogart Tavern Road was coded as handling thru traffic when it

Finally, petitioner complains that the "controlled arterial alternative" disappeared during the project development process and was excluded from the EIS. (Pet. 5, 12.) NEPA's implementing regulations require that an EIS "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). *See also Vermont Yankee*; 435 U.S. at 551. The "controlled arterial alternative" was one of the initial alternatives studied; traffic projections were made; an expressway alternative was developed which more fully satisfied the project needs and avoided taking five historic resources in the Chalfont Historic District; [13] a public meeting was held to discuss the change; and the discussion was included in the alternative section of the DEIS and FEIS. (C.A. App. 3-000806, 3-000802-809; 2-000236; 2-003066; 000430-435.) Clearly, the "controlled arterial alternative" was properly studied and disclosed under NEPA.

Under any test, the disclosure here was adequate. The lower courts properly addressed the claim contested with the well-settled law of this Court and the other courts of appeals.

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was actually a dead end. This was analyzed and determined to be an insignificant impact, limited to only a few hundred feet of roadway. As summarized in affidavits, the results of this analysis verified the results of the traffic analysis using intersection coding. Petitioner had the opportunity to respond to this additional analysis.

[13] Section 4(f) of the U.S. Department of Transportation Act of 1966, unlike NEPA, is a substantive statute that requires FHWA to avoid the use of historic resources if there is a feasible or prudent alternative. 23 U.S.C. §138, *Overton Park*, 401 U.S. at 405. Therefore, the use of the historic resources in Chalfont was avoided.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE COURT'S CONSIDERATION OF EXTRA RECORD EVIDENCE.

Judicial review under the NEPA is based on a review of the administrative record that was before the decision-makers at the time the relevant determinations were made. *Overton Park*, 401 U.S. at 420. In *Camp v. Pitts*, 411 U.S. 138 (1973), this Court stated that "[t]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." 411 U.S. at 142. The Court's decision in *Vermont Yankee*, 435 U.S. at 549, which involved a challenge under NEPA, followed *Overton Park* and *Pitts*. In *Vermont Yankee*, this Court summarized its prior rulings by stating: "We have made it abundantly clear before that when there is a contemporaneous explanation of the agency decision, the validity of that action must 'stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review . . . .'" 435 U.S. at 549, *citing*, *Pitts*, 411 U.S. at 143.

In *Florida Power & Light Co. v. United States Nuclear Regulatory Comm'n*, 470 U.S. 729 (1985), the Court reiterated its holdings in *Overton Park* and *Pitts*. "The task of the reviewing court is to apply the appropriate APA standard of review . . . to the agency decision based on the record the agency presents to the reviewing court." 470 U.S. at 743-44. Thus, in accordance with the standards laid out by this Court, a district court reviewing an agency decision acts like an appellate court—the court generally does not hear or take evidence beyond that which is contained in the administrative record.

This Court has recognized only two exceptions to the well-settled administrative record rule: (1) a district court may require some explanation if the bare record does not disclose the factors considered by the agency or the decision-maker's

construction of the evidence; and (2) additional evidence is permitted where there is a strong showing of bad faith or improper behavior. *Overton Park*, 401 U.S. at 420.

Petitioner claims that it was entitled to an evidentiary hearing because of its allegations of bad faith. (Pet. 16, 21-23.) Again, Petitioner argues that there is a split in the circuits regarding the circumstances under which it is proper to take new evidence. Petitioner claims that the Second, Fourth, and Ninth Circuits permit a broader range of extra-record evidence. [14] (Pet. 17.) To the contrary, those courts apply the same exceptions to the record rule described by this Court and utilized by the courts below in this case. Specifically, with regard to allegations of bad faith, those

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[14] The case law cited by petitioner in support of its contention that there is a split in the circuits in the Second, Fourth, and Ninth Circuits' interpretation of the administrative record rule is not applicable to petitioner's argument. Petitioner argues that an evidentiary hearing is needed based on alleged bad faith conduct by respondents. The cases cited from the Second, Fourth, and Ninth Circuits do not involve issues of bad faith. *See County of Suffolk v. Secretary of Interior*, 562 F.2d 1368 (2d Cir. 1977); *Sierra Club v. Army Corps of Eng'rs*, 772 F.2d 1043 (2d Cir. 1985); *Webb v. Gorsuch*, 699 F.2d 157 (4th Cir. 1983).

Moreover, petitioner incorrectly claims that the Third Circuit flatly prohibits the receipt of any extra record evidence. Petitioner cites *County of Suffolk, 562 F.2d* at 1384-85; *Webb, 699 F.2d* at 159, n.2; and *National Audubon Society*, 132 F.3d at 15, for the proposition that extra-record testimony or affidavits may be considered when allegations are made that an EIS failed to mention an environmental impact or failed to discuss a reasonable alternative. (Pet. 14.) In the present case, the district court and the Third Circuit considered thirteen expert affidavits submitted by petitioner with regard to allegations of inadequate traffic studies and air quality analysis and five affidavits by petitioner's Supervisors (a total of 300 pages). In *Township of Springfield v. Lewis*, 702 F.2d 426, 440-41 (3d Cir. 1983), the Third Circuit also reviewed two expert affidavits submitted by appellants in determining the adequacy of a FEIS citing *County of Suffolk* as authority. In *Township of Springfield*, an evidentiary hearing was also held with regard to the issue of location approval. *Id.* at 434. Third Circuit precedent clearly is consistent with *County of Suffolk*.

circuits have held that, for this exception to the administrative record to apply, there must be "a strong showing of bad faith or improper behavior" citing *Overton Park*, 401 U.S. at 420 as authority. *National Audobon Soc'y v. Hoffman*, 132 F.3d 7, 16 (2d Cir. 1997); *United States v. Shaffer Equipment Co.*, 11 F.3d 450, 460 (4th Cir. 1993); *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988).

In *National Audobon Society*, 132 F.3d at 16, appellant claimed that the agency acted in bad faith by using the environmental assessment (EA) as a tool to justify decisions that the agency had already made. Appellants offered an affidavit from a former employee of the agency that stated that the agency had already decided to issue the Finding of No Significant Impact prior to completion of the EA. *Id.* The Second Circuit upheld the district court's decision not to include extra-record affidavits because appellant failed to make a strong showing of bad faith. *Id.*

Similar to petitioner's claims in the present case, in *Animal Defense Council*, 840 F.2d at 1438, appellant argued that limiting review of the NEPA issues to the administrative record and prohibiting discovery prevented it from gathering the facts necessary to make out its bad faith claims. Upon reviewing the administrative record, the Ninth Circuit held that appellant failed to show that the Bureau acted in bad faith and that discovery would not have helped appellant make that showing. *Id. See also Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991)(*per curiam*)(holding district court did not err by barring discovery when Tribe pointed to nothing in support of its allegations that the Chief of the Forest Service acted in bad faith).

Other circuits have followed the rule developed by *Overton Park* requiring a "strong showing of bad faith or improper behavior". In *Town of Norfolk v. Army Corps of Eng'rs*, 968 F.2d 1438, 1458-59 (1st Cir. 1992), the First Circuit found that appellants failed to make the requisite strong showing of

bad faith upon reviewing the administrative record where appellants alleged that "the Department of Justice and EPA secretly and improperly 'pressured' the Corps to issue the permit." In *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 807-08 (8th Cir. 1998), appellants claimed that the administrative record should be supplemented with voluminous evidence concerning post-sale logging and road construction based on the bad faith exception because "of the discrepancy between the actual logging and road construction taking place, and the environmentally less damaging activity studied in the pre-sale Environmental Assessments." The Eighth Circuit held that this was not a strong showing of bad faith sufficient to justify looking outside the administrative record. *Id.* at 808.

In this case, the district court considered and rejected petitioner's bad faith claim. (Pet. App. 18a-19a, n. 10; 35a.) Although petitioner may quarrel with this conclusion, it is clear that the test applied in this case is consistent with the one followed in other circuits. There is no conflict.

Based on the above discussion, there is no split in the circuits regarding the bad faith exception to the administrative record rule established in *Overton Park*. The Third Circuit and other circuit courts are properly applying the rule set forth by this Court with regard to extra record evidence.

III. BY FAILING TO CHALLENGE THE DISMISSAL OF THE STATE LAW CLAIMS IN THE THIRD CIRCUIT, PETITIONER HAS WAIVED THE ELEVENTH AMENDMENT ISSUE.

This Court has consistently held that certiorari will not be granted on issues not pressed or passed upon in the court of appeals. *United States v. Williams*, 504 U.S. 36, 41 (1992); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148, n. 2 (1970);

Lawn v. United States, 355 U.S. 339, 362-363, n. 16 (1958); *Husty v. United States*, 282 U.S. 694, 701-702 (1931); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

The present case is analogous to *Adickes*, 398 U.S. at 148, n. 2. In *Adickes*, the district court denied petitioner's request to amend her complaint to include a third count under the Civil Rights Act of 1875. *Id.* Petitioner never raised any issue concerning the Civil Rights Act before the Second Circuit. This Court declined to consider the issue under the Civil Rights Act holding: "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Id.*

In the present case, petitioner amended its complaint after Secretary Mallory filed a motion to intervene. Acting on a motion for judgment on the pleadings, the district court dismissed the state law claims based on the Eleventh Amendment by order dated May 25, 2000.[15] Petitioner filed an appeal with the Third Circuit to the district court's June 21, 2001, judgment which granted summary judgment in favor of respondents. The district court's June 21, 2001, decision never addressed the applicability of the state law claims or the Eleventh Amendment. Moreover, neither the notice of appeal, nor the briefs filed by petitioner in the Third Circuit raised the state law claims or addressed the application of the Eleventh Amendment to the dismissal of the state law claims.

Therefore, based on the above discussion, petitioner waived its rights to appeal the dismissal of the state law claims asserted in its amended complaint.

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[15] Petitioner also failed to include the May 25, 2000 district court order in the Appendix as required by Supreme Court Rule 14 (1)(i)(i).

IV. THIS COURT HAS HELD THAT A STATE'S INTERVENTION DOES NOT CONSTITUTE A WAIVER OF ITS ELEVENTH AMENDMENT IMMUNITY WITH RESPECT TO CLAIMS ADDED AGAINST THE STATE AFTER THE STATE FILED ITS MOTION TO INTERVENE.

Irrespective of whether or not petitioner waived the Eleventh Amendment issue by not raising it before the court of appeals, Secretary Mallory did not waive the State's Eleventh Amendment immunity to the state law claims asserted in Federal Court. Under the Eleventh Amendment, a federal court may not award injunctive relief against officials on the basis of state law. *Pennhurst State Sch. v. Halderman*, 465 U.S. 89, 91, 97 (1984). This Court has found:

> [I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underline the Eleventh Amendment.

Id. at 106. Absent an unequivocal expression of the State's waiver of Eleventh Amendment immunity, a State may not be sued without its consent. *Id.* at 98-99.

In the present case, petitioner claims that Secretary Mallory has waived his right to assert Eleventh Amendment immunity because he intervened in this case. But, this Court has specifically held that intervention does not, in and of itself, amount to a waiver of Eleventh Amendment immunity. *Missouri v. Fiske*, 290 U.S. 18, 25 (1933). In *Missouri*, the State intervened in a case in federal court to protect its rights to inheritance tax. In response to the State's intervention, respondents brought an ancillary and supplemental bill of complaint to enjoin the State from prosecuting further in Probate Court. *Id.* at 25. In other words, the respondents there added a claim against the State after intervention. The

State requested the dismissal of the new claim asserting the Eleventh Amendment. Respondents claimed that the State waived its Eleventh Amendment immunity because it intervened in the litigation. *Id.*

First, this Court held that the State did not waive its Eleventh Amendment immunity, finding that the intervention was "limited in character." *Id.* The same result applies to the present case. The district court found: "[D]efendant Mallory has not asserted affirmative rights but merely seeks defensively to protect the perceived interests of PennDot insofar as they may be affected by the resolution of the pending federal claims . . . ." And none of the state law claims added in the amended complaint were in the case prior to intervention.

Second, this Court, in *Missouri*, 290 U.S. at 26-28, also reviewed the Eleventh Amendment issue under the following legal principle: "The entire judicial power granted by the Constitution does not embrace authority to entertain a *suit* brought by private parties against a State without consent given." *Id.* at 26, quoting *Ex parte New York*, 256 U.S. 490, 497 (1921) (emphasis added). This Court found respondents' bill of complaint to enjoin the State was unquestionably a "suit." *Id.* Therefore, this Court held:

> "[T]he State has not come into the suit for the purpose of litigating the rights asserted. Respondents are attempting to subject the State, without its consent. . . ."

Id. at 27. Again, the same is true in the present case. Petitioner filed an amended complaint with state law claims against Secretary Mallory[16] after he filed his motion

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[16] "The Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest.'" *Pennhurst*, 465 U.S. at 101, quoting, *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1045).

to intervene. Petitioner is attempting to subject the State of Pennsylvania to state claims without its "unequivocal" consent.

Petitioner argues that this Court should review the district court's decision in light of its recent decision in *Lapides v. Board of Regents of the Univ. Sys. of Georgia*, 122 S. Ct. 1640 (2002). In *Lapides*, a professor brought suit in state court against respondents, which included the state, alleging violations of state tort law. The defendants agreed to voluntarily remove the entire case to federal court. This Court found that in voluntarily agreeing to the removal of the case to federal court, the State waived its Eleventh Amendment immunity. It would be unfair to permit the state to invoke the federal court's jurisdiction and then to question it. Here, of course, the state defendant did no such thing. He never consented, directly or by implication, to federal jurisdiction on claims that were not present when he intervened.

Based on the above discussion, the district court properly applied the rule set forth by this Court. The State of Pennsylvania did not consent to the state law claims which were included in the amended complaint filed after its motion to intervene. Therefore, the Eleventh Amendment bars a suit against Secretary Mallory based on these state law claims in Federal Court.

CONCLUSION

For these reasons, respondent respectfully requests that the Court deny the writ of certiorari.

Respectfully submitted,

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